IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Cr.A No.254 of 2004

Reserved on: July 2, 2007

Decided on : July 6, 2007.

Ajay Kumar and another **....Appellants.**

VERSUS

State of Himachal Pradesh **....Respondent.**

Coram

The Hon'ble Mr. Justice Surjit Singh, Judge.

The Hon'ble Mr. Justice Kuldip Singh, Judge.

Whether approved for reporting?

For the Appellants : Mr. S.D. Gill, Advocate.

For the Respondent : Mr. Som Dutt Vasudeva, Additional Advocate General, with Mr. D.S. Nainta, Deputy Advocate General.

Surjit Singh, Judge

Appellants, Ajay Kumar and Som Dutt, have preferred this appeal against the judgment of the trial Court, whereby they alongwith three other persons, named Raghubir Singh, Raj Kumar and Prakash Chand, have been convicted for an offence punishable under Section 20 of the Narcotic Drugs and Psychotropic Substances Act. After the pronouncement of the judgment of conviction, three co-convicts of the appellants absconded. The present appellants were heard on the question of quantum of sentence and sentenced to undergo rigorous imprisonment for 12 years each and to pay a fine of Rs.1,00,000/- each and in default of payment of fine to undergo simple imprisonment for a further period of two years.

2. Facts, as culled out from the material on record, are as follows. On the night intervening 1st and 2nd January, 2002 when ASI Duni

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Whether the reporters of the local papers may be allowed to see the Judgment?

Chand (PW-11), accompanied by HC Kushal Kumar (PW-1) and HC Surjeet Singh (PW-2), three Constables and three Home Guard volunteers, was present near Cant. Chowk, Mcleodganj, in connection with *Naka* duty, a Maruti Van bearing registration No.HP-01-3189 appeared from Dharamshala side. It was headed for Mcleodganj. On a signal being raised by the aforesaid police officials, the vehicle stopped. Five persons were found present in the van. Raghubir Singh, one of the absconded convicts, was in driver's seat. Ajay Kumar was sitting on the front seat on the left side of driver seat. On checking of the vehicle, two polythene bags containing *Charas* were found lying near the gear box. On being weighed the stuff was found to be 1.735 grams. Three samples, each weighing 25 grams, were taken out from each of the two polythene bags. The samples and the bulk *Charas* were sealed in separate parcels. Two samples, one each from the recovered two polythene bags, were sent to the Chemical Examiner, who opined that the samples contained contents of *Charas.*

3. Trial Court charged all the five occupants of the van with offence punishable under Section 20 of the Narcotic Drugs and Psychotropic Substances Act and put them on trial on their pleading not guilty. On the conclusion of the trial, all the five occupants of the van, including the present appellants, were held guilty and the appellants were sentenced, as aforesaid.

4. Appellants' main grievance is that the evidence has not been appreciated by the trial Court in the right perspective. Learned counsel for the appellants submitted that there were five persons travelling by the vehicle and there is no evidence which of the five occupants had kept the *Charas* in the vehicle, even if it be believed that *Charas* was recovered from the vehicle, in question. It was submitted that as a matter of fact *Charas* was recovered from some other vehicle, but the occupants of that vehicle were let off and the *Charas* was planted in the van, in question.

5. We have considered the aforesaid submissions in the light of the evidence on record. As per prosecution version, the vehicle reached the spot and was checked at 3.10 a.m. We find that in the report Ex. PW-11/A, which was sent from the spot by ASI Duni Chand (PW-11) for the registration of the case, the time of the arrival of the van, in question, at the site of the *Naka* has been incorporated subsequently. It appears that initially some space was left blank for filling in the time. What made us to suspect the time of search written in Ex. PW-11/A, is a contradiction in the testimony of PW-5 Om Prakash, on one side, and PW-1 HC Kushal Kumar, PW-2 HC Surjeet Singh and PW-11 ASI Duni Chand, on the other. PW-5 Om Prakash stated that the vehicle reached the site of the *Naka* at 1.30 a.m. and Sanjeev Kumar, who was deputed to fetch scale and weights for weighing the stuff returned with the same at 1.45 a.m. The other three witnesses, named above, however, stated that the vehicle reached the spot around 3 a.m. The aforesaid contradiction in the testimony of the prosecution witnesses not only creates reasonable doubt about the correctness of the prosecution version, but also probablizes the defence plea that *Charas* was recovered earlier from some other vehicle and was planted in their van. Testimony of PW-5 Om Prakash suggests that the *Charas* was recovered from a vehicle which reached the spot at 1.30 a.m. Vehicle by which the appellants and their co-convicts were travelling reached the spot around 3 a.m., per testimony of PW-1 Kushal Kumar, PW-2 Surjeet Singh and PW-11 ASI Duni Chand.

6. The abovestated position apart, there is contradiction in the testimony of the prosecution witnesses as to the exact place in the van where the polythene bags containing the *Charas* were lying. According to PW-1 Kushal Kumar *Charas* was recovered from underneath a small seat which was in between the seat of the driver and the front seat. According to PW-2 HC Surjeet Singh, the two polythene bags containing *Charas* were

recovered from a seat in between the two front seats near the gear box. The testimony gives the impression that the two polythene bags were lying on the seat between the driver seat and the front seat. PW-11 ASI Duni Chand has named a third place from where the two polythene bags were recovered. According to him, the polythene bags were lying hidden near the gear box under the driver's seat.

7. There is absolutely no evidence as to which of the five occupants of the van had the conscious possession of the *Charas*. There were five occupants, including the driver. The bags containing *Charas*, as per prosecution version, were lying in the front portion of the vehicle near the seat of the driver. It is quite probable, though not certain because of lack of evidence, that the stuff belonged to the man in driver's seat, i.e. Raghubir Singh, who has since absconded and the other four occupants, three of whom, including appellant Som Nath, who are admittedly slate mine workers, may be innocent.

8. In view of the abovestated position, we accept the appeal, set aside the judgment of the trial Court and consequently acquit the appellants. They being in jail, serving out the sentence awarded by the trial Court, are ordered to be set at liberty forthwith, in case their detention is not required in any other case.

(Surjit Singh), J.

July 6, 2007(sd) **(Kuldip Singh), J**